

CENTER FOR DISABILITY ACCESS
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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Nehemiah Kong,

Plaintiff,

v.

Fahmy Mushmel, in individual and
representative capacity as trustee of
the Mushmel Trust;
Salam Mushmel, in individual and
representative capacity as trustee of
the Mushmel Trust; and Does 1-10,

Defendants.

Case No.

**Complaint For Damages And
Injunctive Relief For** Violations
Of: American's With Disabilities
Act; Unruh Civil Rights Act;
California Disabled Persons Act;
Negligence

Plaintiff Nehemiah Kong complains of Defendants Fahmy Mushmel, in individual and representative capacity as trustee of the Mushmel Trust; Salam Mushmel, in individual and representative capacity as trustee of the Mushmel Trust; and Does 1-10 ("Defendants") and alleges as follows:

PARTIES:

1. Plaintiff is a California resident with physical disabilities. He is a paraplegic who suffers from Polio. He uses a wheelchair for mobility. He has a

1 specially equipped van with a ramp that deploys out of the passenger side of
2 his van.

3 2. Defendants are, or were at the time of the incidents, the real property
4 owners, business operators, lessors and/or lessees for the strip mall located at
5 or about 2202 Sunset Blvd., Los Angeles, California.

6 3. Plaintiff does not know the true names of Defendants, their business
7 capacities, their ownership connection to the property and business, or their
8 relative responsibilities in causing the access violations herein complained of,
9 and alleges a joint venture and common enterprise by all such Defendants.
10 Plaintiff is informed and believes that each of the Defendants herein,
11 including Does 1 through 10, inclusive, is responsible in some capacity for
12 the events herein alleged, or is a necessary party for obtaining appropriate
13 relief. Plaintiff will seek leave to amend when the true names, capacities,
14 connections, and responsibilities of the Defendants and Does 1 through 10,
15 inclusive, are ascertained.

16
17 **JURISDICTION & VENUE:**

18 4. This Court has subject matter jurisdiction over this action pursuant to
19 28 U.S.C. § 1331 and § 1343(a)(3) & (a)(4) for violations of the Americans
20 with Disabilities Act of 1990, 42 U.S.C. § 12101, et seq.

21 5. Pursuant to pendant jurisdiction, an attendant and related cause of
22 action, arising from the same nucleus of operative facts and arising out of the
23 same transactions, is also brought under California's Unruh Civil Rights Act,
24 and the California Disabled Persons Act, which acts expressly incorporate the
25 Americans with Disabilities Act.

26 6. Venue is proper in this court pursuant to 28 U.S.C. § 1391(b) and is
27 founded on the fact that the real property which is the subject of this action is
28 located in this district and that Plaintiff's cause of action arose in this district.

FACTUAL ALLEGATIONS:

7. The Plaintiff went to the strip mall in August of 2014 to eat at a Thai restaurant.

8. The strip mall is a facility open to the public, a place of public accommodation, and a business establishment.

9. Parking spaces are one of the facilities, privileges and advantages offered by defendants to customers of the strip mall.

10. Unfortunately, although parking spaces are one of the facilities available to customers who patronize the strip mall, there is not a single compliant parking space reserved for persons with disabilities who drive vans. Instead, there is a parking space that is 102 inches wide that is accompanied by an access aisle that is 66 inches in width but it is only reserved for patrons of the 7-11 store. There are no other parking spaces in the lot that are reserved for persons with disabilities.

11. However, on information and belief, plaintiff alleges that a fully compliant, accessible van-parking space once existed at this location but the access aisle has been allowed to fade away to the point that it is no longer available for use by persons with disabilities or it has been removed from reserved status. Indeed, there is a faded parking space in front of the Thai restaurant that used to be reserved for persons with disabilities. Unfortunately, the signage has been removed and the access aisle has been paved over. Additionally, the parking space itself is now faded to the point that no one would be put on notice that it is reserved for any particular class of persons.

12. Defendants have no policy or procedure in place to make sure that the accessible parking spaces remain useable in the parking lot. As such, the parking space reserved for persons with disabilities who drive vans is no longer available.

1 13. The plaintiff personally encountered these problems. This inaccessible
2 condition denied the plaintiff full and equal access and caused him difficulty
3 and frustration.

4 14. Plaintiff would like to return and patronize the strip mall but will be
5 deterred from visiting until the defendants cure the violation. Plaintiff lives in
6 Los Angeles County and eats and shops in the County on a regular basis. The
7 strip mall is conveniently located. Plaintiff would like to return.

8 15. The defendants have failed to maintain in working and useable
9 conditions those features required to provide ready access to persons with
10 disabilities.

11 16. Given the obvious and blatant violations, the plaintiff alleges, on
12 information and belief, that there are other violations and barriers on the site
13 that relate to his disability. Plaintiff will amend the complaint, to provide
14 proper notice regarding the scope of this lawsuit, once he conducts a site
15 inspection. However, please be on notice that the plaintiff seeks to have all
16 barriers related to his disability remedied. See *Doran v. 7-11*, 506 F.3d 1191
17 (9th Cir. 2007) (holding that once a plaintiff encounters one barrier at a site,
18 he can sue to have all barriers that relate to his disability removed regardless
19 of whether he personally encountered them).

20 17. Additionally, on information and belief, the plaintiff alleges that the
21 failure to remove these barriers was intentional because: (1) these particular
22 barriers are intuitive and obvious; (2) the defendants exercised control and
23 dominion over the conditions at this location and, therefore, the lack of
24 accessible facilities was not an “accident” because had the defendants
25 intended any other configuration, they had the means and ability to make the
26 change.

I. FIRST CAUSE OF ACTION: VIOLATION OF THE AMERICANS WITH DISABILITIES ACT OF 1990 (On behalf of plaintiffs and against all defendants (42 U.S.C. section 12101, et seq.)

18. Plaintiff repleads and incorporates by reference, as if fully set forth again herein, the allegations contained in all prior paragraphs of this complaint.

19. Under the ADA, it is an act of discrimination to fail to ensure that the privileges, advantages, accommodations, facilities, goods and services of any place of public accommodation is offered on a full and equal basis by anyone who owns, leases, or operates a place of public accommodation. See 42 U.S.C. § 12182(a). Discrimination is defined, inter alia, as follows:

- a. A failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the accommodation would work a fundamental alteration of those services and facilities. 42 U.S.C. § 12182(b)(2)(A)(ii).
- b. A failure to remove architectural barriers where such removal is readily achievable. 42 U.S.C. § 12182(b)(2)(A)(iv). Barriers are defined by reference to the ADAAG, found at 28 C.F.R., Part 36, Appendix "D."
- c. A failure to make alterations in such a manner that, to the maximum extent feasible, the altered portions of the facility are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs or to ensure that, to the maximum extent feasible, the path of travel to the altered area and the bathrooms, telephones, and drinking fountains serving the altered area, are readily accessible to and usable by

1 individuals with disabilities. 42 U.S.C. § 12183(a)(2).

2 20. Any business that provides parking spaces must provide handicap
3 parking spaces. 1991 Standards § 4.1.2(5); 2010 Standards § 208. One in
4 every eight of those handicap parking spaces but not less than one must be a
5 “van” accessible parking space, *i.e.*, having an eight foot access aisle. 1991
6 Standards § 4.1.2(5)(b). Under the 2010 Standards, one in every six
7 accessible parking spaces must be van accessible. 2010 Standards § 208.2.4.

8 21. Here, the lack of an accessible, compliant van-parking space is a
9 violation of the law.

10 22. A public accommodation must maintain in operable working condition
11 those features of its facilities and equipment that are required to be readily
12 accessible to and usable by persons with disabilities. 28 C.F.R. § 36.211(a).

13 23. Here, the failure to ensure that the accessible facilities were available
14 and ready to be used by the plaintiff is a violation of the law.

15 24. Given its location and options, the strip mall is a business that the
16 plaintiff will continue to desire to patronize but he has been and will continue
17 to be discriminated against due to the lack of accessible facilities and,
18 therefore, seeks injunctive relief to remove the barriers.

19
20 **II. SECOND CAUSE OF ACTION: VIOLATION OF THE UNRUH CIVIL**
21 **RIGHTS ACT** (On behalf of plaintiffs and against all defendants) (Cal Civ §
22 51-53)

23 25. Plaintiff repleads and incorporates by reference, as if fully set forth
24 again herein, the allegations contained in all prior paragraphs of this
25 complaint.

26 26. Because the defendants violated the plaintiffs’ rights under the ADA,
27 they also violated the Unruh Civil Rights Act and are liable for damages. (Civ.
28 Code § 51(f), 52(a).)

1 27. Because the violation of the Unruh Civil Rights Act resulted in
2 difficulty, discomfort or embarrassment for the plaintiffs, the defendants are
3 also each responsible for statutory damages, i.e., a civil penalty. (Civ. Code §
4 55.56(a)-(c).)

5
6 **III. THIRD CAUSE OF ACTION: VIOLATION OF THE CALIFORNIA**
7 **DISABLED PERSONS ACT** (On behalf of plaintiffs and against all
8 defendants) (Cal Civ. § 54-54.8)

9 28. Plaintiff repleads and incorporates by reference, as if fully set forth
10 again herein, the allegations contained in all prior paragraphs of this
11 complaint.

12 29. Because the defendants violated the plaintiff's rights under the ADA,
13 they also violated the Disabled Persons Act and are liable for damages. (Civ.
14 Code § 54.1(d), 54.3(a).)

15 30. Because the violation of the Disabled Persons Act resulted in difficulty,
16 discomfort or embarrassment for the plaintiffs, the defendants are also each
17 responsible for statutory damages, i.e., a civil penalty. (Civ. Code § 55.56(a)-
18 (c).)

19
20 **IV. FOURTH CAUSE OF ACTION: NEGLIGENCE** (On behalf of plaintiff
21 and against all defendants)

22 31. Plaintiff repleads and incorporates by reference, as if fully set forth
23 again herein, the allegations contained in all prior paragraphs of this
24 complaint.

25 32. The Defendants had a general duty and a duty arising under the
26 Americans with Disabilities Act and the Unruh Civil Rights Act and
27 California Disabled Persons Act to provide safe, convenient, and accessible
28 facilities to the plaintiffs. Their breach of this duty, as alleged in the preceding

1 paragraphs, has caused injury and damage as alleged above.

2
3 **PRAYER:**

4 Wherefore, Plaintiff prays that this court award damages and provide
5 relief as follows:

6 1. For injunctive relief, compelling defendants to comply with the
7 Americans with Disabilities Act and the Unruh Civil Rights Act. Note: the
8 Plaintiffs are not invoking section 55 of the California Civil Code and is not
9 seeking injunctive relief under the Disabled Persons Act at all.

10 2. Damages under the Unruh Civil Rights Act and/or the California
11 Disabled Persons Act which damages provide for actual damages and a
12 statutory minimum of \$4,000. Note: a plaintiff cannot recover under both
13 acts, simultaneously, and an election will be made prior to or at trial.

14 3. Reasonable attorney fees, litigation expenses and costs of suit,
15 pursuant to 42 U.S.C. § 12205; Cal. Civ. Code §§ 52 and 54.3.

16
17 Dated: January 9, 2015

CENTER FOR DISABILITY ACCESS

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19 By: 
20 Mark Potter, Esq.
21 Attorneys for Plaintiff
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